

JAN 07 2008

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID MOORE; VERONICA MOORE,

Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 05-16824

D.C. No. CV-04-00423-FCD/JFM

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Eastern District of California  
Frank C. Damrell, District Judge, Presiding

Argued and Submitted October 15, 2007  
San Francisco, California

Before: ROTH<sup>\*\*</sup>, THOMAS, and BEA, Circuit Judges.

David and Veronica Moore appeal the district court's grant of summary judgment in favor of the United States. We reverse. Because the parties are familiar with the factual and procedural history, we will not recount it here.

---

<sup>\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The Honorable Jane R. Roth, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

Although the district court had the authority to grant summary judgment without considering the merits, *Brydges v. Lewis*, 18 F.3d 651, 653 (9th Cir. 1994) (per curiam) (“because Brydges was warned of the consequence of his failure to respond to the appellees’ summary judgment motion, the district court did not err by deeming his failure to respond a consent to the motion for summary judgment”), the district court erred in denying the Moores’ motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6). When an attorney has “virtually abandoned his client,” by failing to defend the client in defiance of court orders, the client has satisfied the “extraordinary circumstances” requirement of Rule 60(b)(6). *Cnty. Dental Services v. Tani*, 282 F.3d 1164, 1170-71 (9th Cir. 2002). Here, the attorney “virtually abandoned” the Moores in failing to respond to the motion for summary judgment, even after being warned that such an omission would result in a summary grant of the motion. While his original non-responsiveness may be considered ordinary negligence, by not responding to the motion after learning about it on May 31st—even though the district court gave him until June 8th—the attorney abandoned his advocacy of the Moores’ cause and crossed the line into the “gross negligence” we described in *Tani*. *Id.* at 1169. Because the attorney’s actions amounted to gross negligence, the district court erred in denying relief under Rule 60(b)(6).

**REVERSED and REMANDED.**